No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1924

JAMES SHEWAN & SONS (INC.), APPELLANT

v.

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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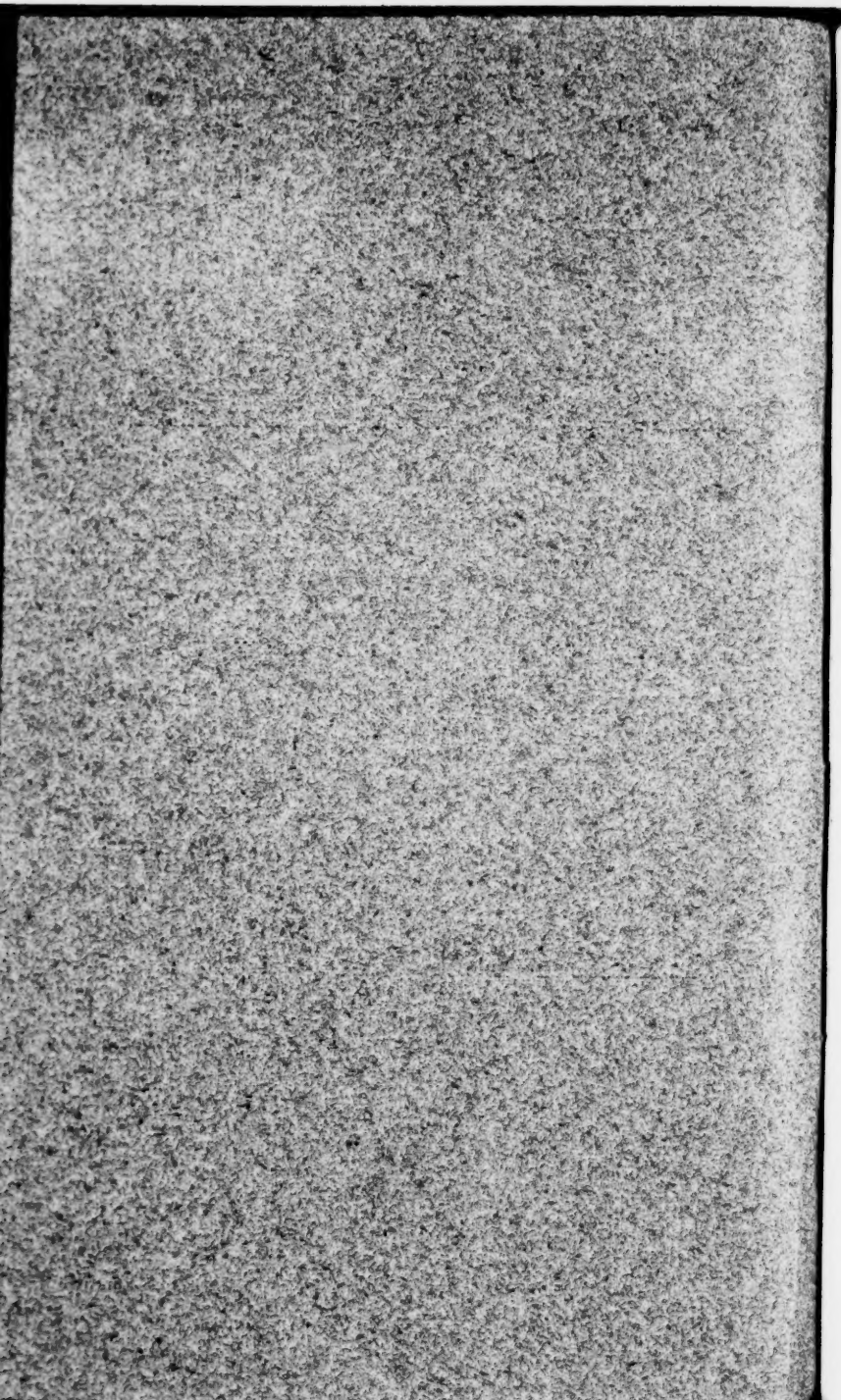

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I

STATEMENT

During May, 1920, James Shewan & Sons (Inc.), made certain repairs to the Steamship *Biran*, amounting to $903.03. The facts determining the status of the steamship at that time are not stated, although the libel alleges she was then employed in merchant service. On June 11, 1921, the *Biran* was withdrawn from merchant service and laid up in the Hudson River, in the care and custody of caretakers employed by the United States Shipping Board and since the *Biran* has carried neither crew nor cargo nor has been the subject of any operating agreement

for use in the merchant or other service. The vessel is owned by the Government.

On May 12, 1922, by assumed authority of the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525), the ship repairer filed its libel against the United States as the owner of the *Biran* to recover its account, asserting the claim upon principles of *in rem* liability. Following the practice approved in the Southern District of New York, the Government filed exceptive allegations (suggestion of want of jurisdiction) stating that as at the time the libel was filed the Steamship *Biran* was not employed as a merchant vessel, the Court was without jurisdiction, as the provisions of the Suits in Admiralty Act must be read to require the vessel to be "employed as a merchant vessel" at the time the libel was filed.

By agreement the status of the *Biran* at the time the libel was filed was that (R. pp. 4, 5):

> * * * on the 11th day of June, 1921, the steamship *Biran* was laid up in the care and custody of caretakers employed by the United States Shipping Board in the out-of-use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship *Biran* has carried neither crew nor cargo, nor been the subject of any operating agreement for use in

> the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States.

By authority of the opinion of Judge Learned Hand, in the case of the *Mack Engineering & Supply Company* v. *United States*, 291 Fed. 713, the District Judge (Augustus N. Hand), without opinion, entered a final decree dismissing the libel. From this final decree an appeal has been taken directly to this court.

The jurisdictional question is whether or not Section 2 of the Suits in Admiralty Act must be read to require the Government vessel charged with liability to be employed in merchant service at the time the libel is filed as a condition precedent to the right to maintain a libel under authority of that Act.

II

ARGUMENT

Section 9 of the Shipping Board Act of September 7, 1916, is the antecedent legislation imposing upon Government vessels employed solely as merchant vessels, the laws, regulations, and liabilities governing merchant vessels. The full text reads (Act of Sept. 7, 1916, c. 451, 39 Stat. 728, 730):

> SEC. 9. That any vessel purchased, chartered, or leased from the board, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the

> benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.
>
> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

This Court in the *Lake Monroe*, 250 U. S. 246, applied this section. In that case at the time of the filing of the libel as well as at the time of the incurment of the lien liability the *Lake Monroe* was employed solely as a merchant vessel.

In order to obviate delays and losses to Government vessels in merchant service through their attachment and detention and to avoid expenses incident to providing surety bonds to secure their release, certain bills were introduced in Congress which eventually passed as the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525). The Act is a pro-

cedural one. (*Blumberg Bros.* v. *United States*, 266 U. S. 452, 458.)

The applicable provisions of the draft of the original bill read as follows (Congressional Record, Vol. 59, Part 2, page 1678):

> *Be it enacted* * * * That the United States, and any corporation in which the United States owns not less than a majority of the capital stock, may be sued in personam in the district courts of the United States in admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States or such corporation of any merchant vessel, or the possession, carriage, or ownership by the United States or such corporation of any cargo *in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit.* Any such suit shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises. (Italics ours.)

The House Judiciary Committee made certain changes and Sections 1 and 2 of the bill reported by that committee (Congressional Record, Volume 59, Part 2, 66th Congress, Second Session, page 1678) provided:

> That every vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation, or operated by or for the United States or such corporation, is hereby declared to be a public vessel of the United States and to be immune from arrest or seizure. Any cargo owned and possessed by the United States or by such corporation is hereby declared to be public property of the United States and to be immune from arrest or seizure.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire.* Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. (Italics ours.)

In the House, Section 2 of the Bill was amended to read (Congressional Record, *supra*, p. 1755):

> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained *at the time of the commencement of the action herein provided for*, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire*. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. (Italics ours.)

Such were the provisions of the bill as sent to conference, where Section 2 was amended to read as appears in the bill as passed, as follows (id. 3630):

> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained *at the time of the commencement of the action herein provided for*, a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel* or is a tugboat operated by such corporation. * * * (Italics ours.)

In explanation of this change, the managers of the conference on the part of the House made the following explanation (id. 3630):

> 2. In Section 2 the words "or intended to be employed in the carriage of cargoes or of passengers for hire" have been stricken out, and the words "as a merchant vessel or as a tugboat operated by such corporation." The effect of this change is to exclude from the scope of the bill certain public vessels not employed as merchant vessels, but that occasionally carry persons and property for hire, and to make certain that tugboats employed as auxiliaries to the merchant fleet are made subject to the proposed act.

A marginal reference to the history of this legislation is made.[1]

The pertinent provisions of Sections 1 and 2 of the Suits in Admiralty Act as finally adopted read:

> *Be it enacted* * * *, That no vessel owned by the United States or by any corporation in

[1] The legislative history of the Suits in Admiralty Act is summarized: The original bill, known as S. 2253, was introduced in the Senate on June 23, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. p. 5869). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. 7538). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec., p. 6017). This bill was debated in the Senate (Cong. Rec., pp. 7317, 7439, 7440), and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec., 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which

which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no *cargo owned or possessed* by the United States or by such corporation shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be,

hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec., 66th Congress, 2nd sess., p. 498). This report was debated (Cong. Rec., pp. 1678-1693, 1750-1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec., p. 3350), and agreed to by the Senate (Cong. Rec., p. 3690, 3691). It was also submitted in the House as H. R. 669 (Cong. Rec., p. 3629), agreed to by the House (Cong. Rec., p. 3631), examined and signed (Cong. Rec., pp. 3864-3885), approved by the President March 9, 1920 (Cong. Rec., pp. 3864-3885), approved by the President March 9, 1920 (Cong. Rec., p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

> provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *

Section 2 of the Act as thus approved and enacted related to proceedings to be maintained "*at the time of the commencement of the action* * * * *provided for*," and imposed the condition that the vessel charged with the lien liability then is employed as a merchant vessel. The District Court (Augustus Hand, D. J.), adopting the opinion of Learned Hand, D. J., in the *Mack Engineering Company* v. *United States*, 291 Fed. 713, so construed the Act. The Government urges the Act must be so construed. It is its plain reading. The Act must be construed strictly.

> *Schillinger* v. *United States*, 155 U. S. 163.
> *The Isonomia* (C. C. A., 2nd Cir.), 285 Fed. 516.

Judge Learned Hand in the Mack Engineering Company case (supra, at p. 713) said:

> The language of the statute does not seem to be open to any doubt; the proviso certainly refers to the time of the filing of the libel and not to the time when the wrong occurred. *I should have to make over the statute* were I to refer to any other time than that so clearly defined. (Italics ours.)

In *Bensaude & Co.* v. *United States* (1923 1 A. M. C. at p. 261), Henry A. M. Smith, D. J. (E. D. of South Carolina) made the same ruling. A number of libels have been dismissed following these rulings.

The appellant suggests that the *Biran* was "em-
oyed in merchant service" at the time the libel was
ed. The facts (agreed to) deny this. The status
the vessel (R. p. 4) is:

> * * * on the 11th day of June, 1921, the steamship *Biran* was laid up in the care and custody of caretakers employed by the United States Shipping Board, in the out of use and laid-up fleet of the United States Shipping Board anchored in the Hudson River near Cornwall, New York, within the Southern District of New York, and so remained at and ever since the time when the libel was filed herein, and that ever since said 11th day of June, 1921, the said steamship *Biran* has carried neither crew nor cargo, nor been the subject of any operating agreement for use in the merchant or other service, nor been transferred by the United States Shipping Board to any other department or agency of the Government of the United States.

Section 2 of the bill as sent to conference (*supra*)
ad:

> *Provided*, That such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire.

As reported by the conference committee and
nally adopted the clause read:

> *Provided*, That such vessel is employed as a merchant vessel.

A vessel laid up in the out-of-service fleet is not
nployed as a merchant vessel. She is not being

commercially operated. She has been withdrawn from trade. She is laid up in the custody of caretakers. She is not employed as a merchant vessel—she has no employment.

CONCLUSION

It is respectfully submitted the appeal should be dismissed.

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ALBERT OTTINGER,
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J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.

SEPTEMBER, 1924.